Supreme Court, U.S.
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No. 03-780

IN THE

Supreme Court of the United States

ISAIAH RUSSELL JONES, ROBERT SPARKS, JR., & HERMAN PARKS, JR.,

Petitioners,

v.

ALCOA INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit properly affirmed the district court's decision to dismiss the Petitioners' Complaint based upon the applicable two year statute of limitations where Petitioners' claims under 42 U.S.C. § 1981 for alleged discriminatory acts occurred over thirty to fifty years ago?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The names of the parties to this proceeding appear on the cover. There is no parent or publicly held company that owns 10% or more of Respondent Alcoa Inc.'s stock.

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COUNTER STATEMENT OF THE CASE

Petitioners are former employees who worked for Alcoa in the Rod Room, Carbon Plant, and Potlining Departments at Alcoa's Rockdale plant in Milam County, Texas. R4:91 (Complaint, ¶¶ 7, 9)[1] Petitioners allege that Alcoa initially assigned them and then limited them to working in these departments in an effort to expose African-American workers, rather than white workers, to the health risks of asbestos exposure, and thus, engaged in racially discriminatory practices. R4:91-92 (Complaint at ¶¶ 7, 9, 17, 19).[2] Petitioners further allege that Alcoa engaged in other racially discriminatory acts, including denying them access to dining and restroom facilities, denying them transfers out of the above-mentioned departments and denying them promotions to higher paying positions. R4:92 (Complaint at ¶ 11). These practices allegedly occurred during the 1950's until the early 1970's. R4:91 (Complaint at ¶ 10).

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1. This cite form refers to Alcoa's record excerpts prepared for the Fifth Circuit, tab 4, page 91. The page number refers to the district court's pagination in the lower right-hand corner of the record excerpts.

2. While not relevant to the narrow issue presented for review, Alcoa notes, as did the Fifth Circuit, that Petitioners' allegations of racial discrimination are not supported by the record. *See* Fifth Circuit Opinion, Appendix at pp. 13a & 14a n.7. Instead, the record establishes that approximately two-thirds of the employees in the Potlining Department were white and Petitioners themselves testified that they worked side by side with white workers in each of the three departments where they claim they were exposed to the asbestos. R4:91-92; R6:194-195. Moreover, the record establishes that a number of African-American workers were not initially assigned to the three departments as Petitioners allege. R7:316.

Petitioners assert that they developed lung disorders of varying degrees from their alleged exposure to asbestos. R4:92-93 (Complaint at ¶¶ 19-21). However, Petitioners did not file this suit as a personal injury suit or other tort cause of action against Alcoa.[3] Instead, Petitioners filed suit against Alcoa alleging intentional race discrimination in violation of 42 U.S.C. § 1981 ("Section 1981"), and sought personal injury damages for their alleged lung disorders. The district court dismissed Petitioners' claims as time barred under the applicable two year statute of limitations. District Court Opinion, Appendix at p. 18a. The Fifth Circuit affirmed this decision in a written opinion and further denied Petitioners' Motion for Rehearing. Fifth Circuit Opinion, Appendix at pp. 1a and 22a. The Petitioners have now sought certiorari review with this Court. For the reasons set forth below, their petition should be denied.

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3. The record shows that Plaintiffs dropped their gross negligence claim in their amended complaint after Alcoa's first motion to dismiss asserted that Plaintiffs' gross negligence claim would be barred by the Texas Workers' Compensation Act, which provides the exclusive remedy for employees who are injured in the course and scope of their employment. *See* R1:14; R2:49-52. At all relevant time periods, Alcoa was a subscriber under the Texas Workers' Compensation Act. R1:17. Accordingly, if Petitioners had brought this case as a personal injury suit, Petitioners' claims of injuries that were allegedly sustained while in the course and scope of employment would have been barred by Tex. Lab. Code. Ann. § 408.001 (Vernon 1996) (the "exclusive remedies" provision). *See, e.g., Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88, 89 (Tex. App.-Beaumont 1998, pet. dism'd by agr.) ("The Texas Workers' Compensation Act is the exclusive remedy for an employee injured in the course and scope of his employment.") Petitioners would not have been left without a remedy, however, as they could have sought recovery under the workers' compensation laws.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present Any Issue Appropriate For Review Under Supreme Court Rule 10 And The Writ Should Therefore Be Denied.

Supreme Court Rule 10 makes clear that review by writ of certiorari is not a matter of right but of sound judicial discretion. A petition for a writ of certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held that "'special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, this Court has stated that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Id.* at 79 (citations omitted). This case fails to present special or important reasons for Supreme Court review. To the contrary, in bringing this petition for certiorari, Petitioners raise nothing new to suggest that the decisions of the Fifth Circuit or the district court were in error. Instead, Petitioners continue to make the same specious arguments which have been rejected by both lower courts in this case under well-established and uncontested law.

Moreover, Petitioners do not allege, nor is there any evidence to suggest, that any of the considerations of Rule 10 apply. There is no conflict in the Circuits on the narrow issue raised by Petitioners. Instead, the applicable law

established by this Court in *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980), has been consistently applied by each of the Circuits.[4] Likewise, the petition does not present any conflict on an important federal question. Finally, this case does not present any compelling circumstances which indicate that the Court of Appeals or the district court departed from the accepted and usual course of judicial proceedings so as to warrant review by this Court. For all of these reasons, as well as those set forth below, the petition for certiorari review should be denied.

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4. *See Campbell v. Bank Boston, N.A.*, 327 F.3d 1, 11 (1st Cir. 2003); *Flaherty v. Metromail Corp.*, 235 F.3d 133, 137 (2d Cir. 2001); *Watson v. Eastman Kodak*, 235 F.3d 851, 855 (3d Cir. 2000); *Martin v. Southwestern Virginia Gas Co.*, 135 F.3d 307, 310 (4th Cir. 1998); *Jones v. Alcoa Inc.*, 339 F.3d 359, 365-68 (5th Cir. 2003); *Amini v. Oberlin College*, 259 F.3d 493, 498-99 (6th Cir. 2001); *Williamson v. Ind. Univ.*, 345 F.3d 459, 463 (7th Cir. 2003); *Conner v. Beckitt & Colman*, 84 F.3d 1100, 1102 (8th Cir. 1996); *R.K. Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059-60 (9th Cir. 2002); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1187 (10th Cir. 2003); *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998); *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894, 896 (D.C. Cir. 1998) (all holding that the statute of limitations runs from the date on which a plaintiff knows or reasonably should know that a discriminatory act has occurred, not the date on which a plaintiff knows the consequences or effects of the alleged discriminatory act).

II. Certiorari Review Is Not Appropriate In This Case Where The United States Court Of Appeals For The Fifth Circuit Properly Applied The Applicable Two Year Statute Of Limitations To Bar Petitioners' Claims Under Section 1981.

In bringing this petition for certiorari review, Petitioners do not include any new "facts" or "evidence" to suggest that the decisions of the lower courts were incorrect. Instead, Petitioners would like this Court to apply uncontested law to undisputed facts and reach a different result.[5] This is not a basis for Supreme Court review and this Court should deny the petition for certiorari.

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5. This strategy is most evident in the final section of the petition in which Petitioners admit that

> permitting a lawsuit over conduct that occurred between thirty and fifty years ago runs against the grain of most courts. There is an intuitive reaction to such a suit that says that Plaintiffs waited too long, that proof would be difficult if not impossible, or that the defense of the case would be hampered by the lapse of time.

(Petition at p. 23). Petitioners present nothing to suggest that the applicable precedent should be disregarded to allow such a suit to go forward in this case.

A. The Statute Of Limitations In A Section 1981 Case Runs From The Date Of The Alleged Discriminatory Acts, Not The Date On Which The Full Consequences Of Those Acts Are Known.

This case involves the well-established law concerning when a cause of action accrues in a Section 1981 discrimination case.[6] This Court's long-standing precedent, which has been interpreted and applied consistently by the Fifth Circuit, governs the resolution of this case. In *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980), this Court stated that in a Section 1981 action, the "time limitations periods commence with the date of the 'alleged unlawful employment practice.'" *See also Chardon v. Fernandez*, 454 U.S. 6, 7-8 (1981) (holding that the limitations period for discriminatory discharge cases begins running at the time of notification, rather than at the time of discharge). Thus, in an employment discrimination case, a court looks to the time of the alleged discriminatory act – not to the time when a victim discovers a particular injury – to determine when the statute begins to run. As this Court further explained in *Ricks:* "[T]he proper focus is on the time of the *discriminatory acts*, not upon the time at which the c*onsequences* of the acts became most painful." *Id.* at 258 (*quoting Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added).

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6. The parties do not dispute that this Section 1981 case is governed by the two-year statute of limitations for personal injury actions in Texas. *See Johnson v. Railway Express Agency, Inc.*, 95 S. Ct. 1716, 1721 (1975) (federal civil rights actions brought under section 1981 are governed by most closely analogous limitations period provided under state law); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (under Texas law Section 1981 claims are subject to a two-year statute of limitations).

In this case, the alleged "acts of discrimination" which form the basis for Petitioners' Section 1981 claims are clearly set forth in the Complaint.[7] First, Petitioners allege that they were discriminated against as the result of alleged racially-based placement into one of the three departments where asbestos was purportedly present. R4:91-93 (Complaint at ¶¶ 7, 9, 17, 19). Second, the Complaint alleges that Petitioners were denied access to dining and restroom facilities. R4:92 (Complaint at ¶ 11). Third, the Complaint alleges that Petitioners were denied transfers out of the above-mentioned departments. *Id.* Finally, the Petitioners allege that they were denied promotions to higher paying positions. *Id.* The Complaint further sets forth the date of these alleged discriminatory acts as the 1950's to 1970's. R4:91 (Complaint at ¶ 10).

The two-year statute of limitations begins to run from the date of the alleged acts of discrimination. Petitioners do not dispute that these alleged discriminatory acts occurred thirty to fifty years ago, or that Petitioners were aware of the alleged discriminatory practices at that time. The Fifth Circuit properly agreed that the precedent in *Ricks* was applicable to this matter. *See* Fifth Circuit Opinion, Appendix at p. 8a.

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7. The Fifth Circuit further noted that there was a serious question as to whether the claims as pled were even cognizable under Section 1981 because the Complaint "is devoid of any detail, let alone any factual basis to support the conclusion that assignment to the three departments in question was, in fact, a term implied in the plaintiffs' initial employment contract. . . ." Fifth Circuit Opinion, Appendix at p. 4a. *See also Felton v. Polles*, 315 F.3d 470, 484-85 (5th Cir. 2002) (claim of racial harassment based on conduct occurring prior to the 1991 amendments is not actionable under section 1981); *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 713 (5th Cir. 1994) (1991 amendments to section 1981 are not given retroactive effect).

("The plaintiffs' claim, therefore, clearly implicates the rule of *Delaware State College v. Ricks*, 101 S. Ct. 498, 504 (1980) (holding that the limitations period for employment discrimination begins to run from the date of the unfavorable employment decision)").

Petitioners attempt to avoid the application of *Ricks* by misstating the record. The Petition is replete with inaccurate representations that Petitioners "did not suffer the typical injury from a discriminatory act" and "are not complaining that the discrimination denied them some contractual benefit like fair wages, proper promotions or other employment benefits." Petition at 10, 18.[8] However, their Complaint alleges just the opposite. More specifically, the Complaint states as follows:

> As Negro employees, they were not allowed to use restroom and dining facilities utilized by the white employees, nor were they allowed advancement to other higher paying jobs in the other departments; rather, they were required to continue to work in the pot lining, the carbon plant and the rod room departments. Alcoa utilized this employment practice in its other similar facilities throughout the southern portion of the United States.

Petition at 4; R4:92 (Complaint, ¶ 11). Thus, it is clear from the face of the Complaint that Petitioners allege that they suffered an injury as a result of the alleged discrimination

8. Petitioners acknowledge that if they were arguing for these things "then Alcoa's rule [concerning the statute of limitations] might make sense." Petition at 18. Given the facts as alleged in the Complaint, Alcoa's "rule" makes eminent sense.

within the limitations period. The alleged injuries coming from asbestos exposure are merely an additional "consequence" of the alleged discrimination – they are not the *acts of discrimination* themselves. This case therefore clearly falls within the framework of the *Ricks* opinion. If Petitioners are held to their pleadings, the dates of the alleged discriminatory acts occurred more than thirty years ago. These are the determinative dates for the limitations period according to *Ricks*. Accordingly, the Fifth Circuit and district court correctly dismissed Petitioners' claims in their entirety as time barred.

B. The Discovery Date Of Petitioners' Personal Injuries Is Irrelevant Because This Is Not a Personal Injury Cause Of Action.

Petitioners implicitly recognize that the rule set forth in *Ricks* governs the outcome of this case. In an effort to avoid that result, Petitioners argue that the "discovery rule" applicable to personal injury lawsuits should apply.[9] As Petitioners elected to bring this matter as an employment discrimination case, the rules regarding the time limitations periods for employment discrimination cases are dispositive,

9. Petitioners' confusion regarding the crux of their case permeates their entire petition. Petitioners argue that they "were not aware of the existence of an injury because the injury (respiratory disease) did not manifest itself for many years after the date of the injury (exposure to asbestos due to segregated conditions at the Rockdale plant)." Petition at 16-17. In one sentence, Petitioners define "the *injury*" (emphasis added) to be two different things: the respiratory disease and the alleged discriminatory employment acts. *Id.* Petitioners cannot have it both ways: they have pled a discrimination cause of action and must be held to their pleadings regarding their claim – the alleged discriminatory act of segregated initial job assignments.

not the rules regarding limitations in personal injury actions. Accordingly, the district court and the Fifth Circuit both properly recognized that *Ricks* is the controlling authority for this case.

Petitioners present nothing new to this Court to suggest that the application of *Ricks* to the facts of this case was in error. Instead, Petitioners make the same specious argument rejected by the Fifth Circuit that *Ricks* provides an exception in this case. In *Ricks*, this Court stated in dicta that the limitations period "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Ricks*, 101 S. Ct. at 506 n.16.[10] However, the Fifth Circuit properly found that Petitioners' interpretation of *Ricks* did not merit a different result in this case:

> Finally, we are unpersuaded by the plaintiffs' attempt to find refuge in the palliative language of a footnote of the Court's opinion in Delaware State College v. Ricks . . . What plaintiffs do not point out, however, is that in the same footnote, Justice Powell nevertheless held Ricks' claim to be barred since "there [could] be no claim . . . that Ricks was not abundantly forewarned" of the impending employment decision that ultimately formed the basis of his suit. Like Ricks, there is no allegation

10. In making this reference, the *Ricks* court cited to two cases which are vastly different from the case at bar. In both *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979) and *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972), this Court was concerned with barring a plaintiff where the procedural technicalities of filing with a state agency or the EEOC caused the claim to be untimely. This is not the case here. Petitioners were well aware of the alleged acts of discrimination which form the basis for their Section 1981 action and never brought a suit until decades after the triggering event occurred.

> or indication that the plaintiffs here were not aware of the claimed racial discrimination decades before they brought suit. Nor do we see any danger that our application of the statute of limitations in this case risks undermining the protections of the civil rights statutes.

Fifth Circuit Opinion, Appendix at p. 11a.

Petitioners have set forth no argument as to why the well-reasoned decision of the Fifth Circuit is incorrect. Tellingly, Petitioners do not cite a single Section 1981 or employment discrimination case in which the discovery rule has been applied. To the contrary, courts universally hold that with respect to employment discrimination cases, the limitations period begins to run at the moment the plaintiff is on notice of the *discriminatory act*. Petitioners here have never disputed that they were on notice of the alleged discriminatory assignments upon their occurrence. Accordingly, the fact that they did not suffer the full extent of injuries from the alleged discriminatory acts is of no import. Instead, the voluminous citations in the petition are all from cases outside the employment discrimination context.[11] Indeed, the case relied on most heavily by

11. None of the Petitioners' citations in the discovery portion of their petition support their argument that the discovery rule should be applied in a Section 1981 case. The following cases were cited in that portion of the petition. *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (holding that the plaintiff's Federal Tort Claims Act for medical malpractice was barred by the statute of limitations and that the discovery rule did not operate to defer the running of the limitations period); *Computer Assoc.'s Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (holding that the discovery rule did not

(Cont'd)

Petitioners, *Urie v. Thompson*, 337 U.S. 163 (1949), cites to language from a state workmen's compensation decision in finding that the discovery rule applies in the context of a personal injury action under the Federal Employers' Liability Act ("FELA"). The instant case was brought as an employment discrimination action, not a personal injury case. The discovery rule is simply inapplicable in a case, such as this, where the petitioners were aware of the event that triggered the running of the statute: the alleged acts of discrimination. Petitioners' lack of knowledge as to the consequences of those alleged acts is simply irrelevant in the context of this suit as pled by Petitioners.

Throughout this case, Petitioners have sought to pursue a personal injury claim utilizing an employment discrimination cause of action. Attempting to pick and choose

(Cont'd)

apply to the plaintiff's misappropriation of trade secrets claim); *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732 (Tex. 2001) (holding claimed injury was not "inherently undiscoverable"); *S.V. v. R.V.*, 933 S.W.2d 1, 7 (Tex. 1996) (holding that plaintiff's negligence claim for sexual abuse by her father was barred by limitations because her injury was not "objectively verifiable"); *Apex Towing Co. v. Tolin*, 41 S.W.3d 118 (Tex. 2001) (tolling plaintiff's legal malpractice claims until the underlying litigation was finally resolved); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998) (holding that the discovery rule did not toll the statute of limitations for breach of contract and negligent misrepresentation claims); *DuBose v. Kansas City Southern Railway*, 729 F.2d 1026, 1028 (5th Cir. 1984) (applying the *Kubrick* discovery rule to a wrongful death action brought under the Federal Employers' Liability Act (FELA)); and *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984) (holding that the statute of limitations barred the plaintiff's personal injury claims under the Jones Act) (Petitioners' papers incorrectly cited this holding for the proposition that the statute of limitations did not bar the claims).

the most favorable provisions from each body of law, Petitioners crafted their case to avoid the worker's compensation bar, but have run up against the irrefutably applicable statute of limitations. As a result, Petitioners have now switched their focus away from the act of discrimination, which Section 1981 was enacted to remedy, and have focused instead on the alleged consequences of that purported discrimination. The discovery of additional consequences of alleged discrimination is of no relevance in a Section 1981 case. Instead, the statute of limitations clearly begins to run at the time Petitioners were first aware of the alleged discriminatory acts. Here, those acts are the placement of Petitioners in a particular department allegedly because of their race. Because those acts occurred nearly a half century ago, Petitioners' claims are time barred.

C. The Fifth Circuit And District Court Properly Barred Petitioners' Claim Because The Limitations Period Was Designed To Protect Defendants From Defending Stale Claims Such As This One.

This Court has recognized that limitations periods were designed to protect potential defendants from cases such as this one:

> Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the "right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from

> having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations omitted). The Fifth Circuit and the district court properly applied the statute of limitations in this case to prevent Petitioners' claims from going forward. In this case, Alcoa's right to be free from such a stale claim should prevail over Petitioners' desire to prosecute it, especially where Petitioners would not have been left without a remedy. *See supra* note 3.[12]

In a Section 1981 discrimination case, Plaintiffs are required to show discriminatory intent by the employer to successfully prosecute their claim. *General Bldg. Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1981). Showing a discriminatory intent, not to mention defending against allegations half a century old, would be nearly impossible as witnesses certainly have died, memories have faded, and documents, if they still exist, may be impossible to locate. It would be fundamentally unfair to allow Petitioners to proceed with an employment discrimination suit on these facts. The Fifth Circuit properly upheld Alcoa's statute of limitation defense and Petitioners' writ should be denied.

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12. Moreover, as noted by the Fifth Circuit, the record is devoid of any evidence that would suggest Petitioners are entitled to any sort of equitable tolling of the applicable statute. Fifth Circuit Opinion, Appendix at p. 12a.

CONCLUSION

Because the Court of Appeals properly affirmed the District Court's decision dismissing Petitioners' Complaint based upon the applicable statute of limitations and Petitioners present no issue worthy of this Court's certiorari review, Respondent Alcoa respectfully requests that the Petition for Certiorari review be denied in all respects.

Respectfully submitted,

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